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BARRISTERS SOLICITORS

October 31, 2012

BY COURIER

58375-SF
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Attorney General & Minister of Justice
Department of Justice
5151 Terminal Road
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The Honourable David Wilson
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Department of Health and Wellness
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Chris Power
President & Chief Executive Officer
Capital District Health Authority
1796 Summer Street
Halifax, NS B3H 3A7

Dear Ministers and Ms. Power:

Re: Joint Review of the East Coast Forensic Hospital's Community Access Privileges – September 2012

We have been retained by and represent Darren Lewis and other close family members of Raymond Taavel ("Raymond's Family").

As you are aware, Darren was Raymond's long-time common-law spouse. They lived together in Halifax until Raymond's tragic death at the hands of Andre Denny on April 17, 2012. The remainder of Raymond's Family are located in Ontario.

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We have been retained to assist the Raymond's Family in responding to the *Joint Review of the East Coast Forensic Hospital's Community Access Privileges*, as outlined in the written report dated September 2012 ("the Joint Review").

It is obviously trite to say that the events of April 17th and their aftermath, resulting in the tragic loss of Raymond, have been extremely painful and emotional for his family to endure. It takes time for any family to both accept and come to terms with this type of tragedy. Understanding the root causes of this tragedy and having comfort that sufficient positive changes will be implemented to ensure it does not happen again, will help Raymond's Family in that process.

In addition to their very public loss of Raymond as a much-loved spouse, child, and sibling, Raymond was also a much-loved and active member of the Halifax GLBT and broader community. The public expressions of grief, support and compassion received by Raymond's Family from all parts of the community have been most welcome and have provided some comfort, as they waited patiently for the results of the Joint Review.

Before we outline some specific comments in response to the Joint Review, we should confirm that Raymond's Family appreciate the commitment by Government and Capital Health to complete the Joint Review, and for the efforts made in communicating with the family and providing an advance copy of the Joint Review on September 17, 2012.

We certainly hope that this spirit of cooperation and respect can continue through the coming months as both Government and Capital Health work to fulfill their stated commitments to implement all recommendations contained within the Joint Review, consideration of further recommendations from the public, and to provide an update report to the public within six months.

As the saying goes, “talk is cheap”, and rest assured that Raymond’s Family will be watching closely to ensure that rhetoric and public statements from our political and health leaders turn into concrete action and positive change – that would have been demanded by Raymond himself – to ensure his memory is honoured and his tragic death was not in vain.

General Response

Many have commented how Raymond was a deeply caring and compassionate man. Nobody knew this more than Darren and the rest of Raymond’s Family.

It must be remembered that along with his compassion, Raymond had a strong sense of social and political justice and a desire to see right prevail over wrong. Although he believed in consensus and co-operative conflict resolution, he had the courage and passion to speak out and demand change when necessary to do so. We know, had this tragedy happened to someone else, he would be on the front lines of the public and media supporting demands for change, as outlined in this letter.

In reviewing and responding to the Review Report, Raymond’s Family both respect and honour Raymond’s commitment to justice, equity and positive change in the community. No one wishes or seeks to stigmatize the mentally ill in our community. The only motivation behind this submission on behalf of Raymond’s Family is to ensure that much-needed systemic changes are fully implemented by Government and Capital Health to meet the recognized dual goals of ensuring protection of the public during the fair and appropriate treatment of mentally ill offenders.

While they still grieve deeply, they recognize and accept the need to ensure a fair and reasonable balance between protection of the public and safe and effective treatment of mentally ill offenders – those found not-criminally responsible (“NCR”) of crimes due to mental illness.

This context, however, must not be forgotten. We are not simply dealing with mentally ill patients within society at large. As emphasized by the Supreme Court of Canada in rejecting constitutional challenges to the system implemented by Part XX.1 of the Criminal Code, the NCR offender is to be treated:

> "…in a special way in a system tailored to meet the twin goals of protecting the public and treating the mentally ill offender fairly and appropriately. Under the new approach, the mentally ill offender occupies a special place in the criminal justice system; he or she is spared the full weight of criminal responsibility, but is subject to those restrictions necessary to protect the public".[1]

While the Joint Review concluded that in a number of respects existing policies and procedures were correctly followed and are similar in scope to or exceed others across Canada, it did identify "significant gaps" where improvements are required to increase public protection.

Such changes are also required to increase and ensure public confidence in the system we use to assess, treat and reintegrate NCR offenders safely into society.

In this regard, we are writing to strongly support and encourage both Government and Capital Health to fully meet their commitments to work together with the Criminal Code Review Board ("the CCRB" or "Review Board") to ensure both the content and spirit of all recommendations are realized and implemented in a timely manner, and to ensure that no other family must endure the tragic loss of a loved-one at the hands of a violent NCR offender gone AWOL from a forensic facility.

From our review, and as noted by Government, all of the recommendations outlined in the Joint Review are reasonable, have solid backgrounds in fact, and are the minimum necessary to ensure that the identified gaps are closed and protection of the public is more appropriately balanced.

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[1] *Winko v. Forensic Psychiatric Institute (B.C.)*, [1999] 2 S.C.R. 625 (S.C.C.), para. 30.

However, Raymond's Family strongly believes that in some areas more can and should be done to properly balance the joint goal of public protection with fair and appropriate treatment options for NCR offenders.

Some issues contained in the Joint Review have been extremely painful for Raymond's Family to review and accept.

To summarize, it is tragically apparent that contrary to both the intent of Parliament and the Criminal Code, it became a common practice for staff at the East Coast Forensic Hospital ("the Hospital") to permit NCR offenders to have a 1-hour unescorted pass to leave the Hospital grounds prior to any form of CCRB review – a practice and issue previously raised as problematic by the CCRB at joint meetings with Capital Health and unresolved at the time of Raymond's death.

Further, with respect to safe, reasonable and balanced surveillance of NCR offenders, particularly those who are AWOL (Absent Without Leave) or with a history of violence, we believe that certain options that could be implemented to enhance public protection have been dismissed with little or no analysis and on unreasonable grounds, and must be pursued.

As such, we are writing to provide this response from Raymond's Family with further recommendations with respect to 2 issues on which they respectfully conclude have not been adequately addressed within the Joint Review or subsequent public comments from Government or Capital Health leadership:

(1) Availability of unescorted passes to NCR offenders who have not yet completed a necessary review before the CCRB; and,

(2) Options for enhanced NCR offender surveillance during unescorted release to the community.

1. No Unescorted Release Prior to CCRB Review.

The Joint Review found clearly that NCR offenders were increasingly being issued 1-hour unescorted passes, prior to any disposition hearing being conducted by the CCRB.

The focus appears to be on the use of such passes as providing the opportunity for NCR offenders to smoke, off Hospital property, as a result of the smoking ban at all Capital Health facilities. Much public discussion has occurred on the recommendations relating to construction of an on-site smoking section at the Hospital to ensure NCR offenders are not leaving the facility for that purpose.

It is, frankly, incomprehensible to Raymond's Family that any NCR offender has been permitted to leave the Hospital for <u>any length of time or for any reason</u>, when no prior and legally required disposition hearing had been conducted by the CCRB that could properly assess the public risk of such unescorted release.

This specific issue goes far beyond description as a "gap" – it represents a level of complacency, systemic negligence and abuse of policy that was clearly unbalanced as between any sense of public protection and the liberties of NCR offenders.

While Raymond's Family strongly supports the recommendations with regard to "Community Access", the focus should not be on whether a smoking facility should be constructed by Capital Health (a position that appears to be resisted by its current leadership).

The focus must be on the "human elements" of ensuring the appropriate levels of training, assessment, compliance with the law, and transparent CCRB review take place before any NCR offender obtains the privilege of unescorted release from the Hospital providing access to the public, for any length of time.

In addition, Raymond's Family strongly support the immediate suspension of all leaves after any patient becomes AWOL, until a full review of their community access privilege is completed by the CCRB pursuant to a defined process for reassessment and possible reinstatement.

For transparency and accountability, and to ensure further public support, we expect that such new policies and procedures will be disclosed and confirmed in the upcoming report that Government has committed to release within 6 months.

Raymond's Family, the media, and the public at large will be looking closely to review this and other recommended policies and enhancements that will be created and implemented as part of this process.

2. GPS Tracking Must Be Adopted to Enhance Surveillance for Those NCR Offenders With a History or Risk of Violence.

To be clear, Raymond's Family rejects outright the brief reasons articulated for the rejection of using GPS technology to track NCR offenders when they are on unescorted passes from the Hospital.

While there is a clear acknowledgement noted in the Joint Review that both NCR offenders and the public would benefit from additional surveillance methods and evaluation, Dr. Brink rejected GPS technology "at this time", and yet had no difficulty recommending possible use of cell phone or pager technology to complement current monitoring.

With the greatest respect, the reasons given in rejecting the use of GPS technology "at this time" are not credible or logical. In addition, while stating "additional research" is needed, the Joint Review makes no mention or recommendation of further study in this area, and Government has made no commitment subsequently to examine the matter further (either for study or implementation).

It is unacceptable to reason that we should not pursue GPS tracking in Nova Scotia because it has yet to be adopted at any other forensic facility in Canada. First, Nova Scotia has been a leader in various other areas of policy and government action, and to state the obvious, someone always has to be "first". We were the first Province to enact climate change goals into legislation, the first to meet significant household waste diversion targets, and we aspire to be leaders in many other areas. We should also be leading in this important and special area of the criminal justice system.

Second, while not yet adopted in Canada, the use of GPS tracking technology has been implemented in other large, western jurisdictions such as various states in the United States of America and in the United Kingdom, for tracking of NCR offenders held at or on release from forensic facilities.

Third, we cannot understand the significant difference in suggesting that cell phone or pager technology could be utilized for tracking, and yet GPS technology cannot? We presume (without the benefit of any detailed analysis within the Joint Review) that this may be because a cell phone or pager could be viewed as less "intrusive" to the rights of a NCR offender – however, it must again be emphasized that the liberties of NCR offenders are not absolute. There must be an appropriate and nuanced balance between the joint goals of public protection and reasonable treatment and rights of offenders who have been found not criminally responsible for what would otherwise be criminal conduct.

Fourth, at minimum, we would expect that having identified "additional research" is required, that the Joint Review and Government would commit to fund and implement such research and possible trial implementation of this technology, now in use in the USA and UK, as a further tool to balance public protection. Outright rejection and lack of funding will not be tolerated.

In conclusion, we see the use of GPS technology (or other effective forms of enhanced surveillance and monitoring) as an important and potentially crucial additional tool for NCR offender surveillance, as part of this necessary balancing.

Such technology could be reserved only for those NCR offenders who have exhibited or may be at risk of committing violence against others, when introducing them at the appropriate time (as determined by the CCRB) to unescorted public access.

As with Mr. Denny, in the event that such an offender with a clear history of violence is being introduced to unescorted public access, and becomes AWOL, this technology would ensure (beyond reliance on the offender him or herself to report or keep a cell phone or pager active on their person) that the location of the offender could be accessed when required and they could be safely returned to the Hospital.

With respect, again, this becomes almost a "common sense" issue for the public and for Raymond's Family, and is not intended nor should it stigmatize mentally ill patients generally or impose an undue burden on the constitutional liberties of NCR offenders.

We point out that shortly after our brief public comments to the media following release of the Joint Review on September 18th, various media and many members of the public, including an Editorial opinion from The Herald, supported our call for use of GPS tracking in these limited circumstances.

Finally, with respect to legal rights and in particular Charter issues, we ultimately see no legal impediment to the limited use of this technology, particularly for NCR offenders with a history or significant risk of violence and danger to the public following necessary CCRB review. Such implementation, to borrow the words of the Supreme Court of Canada, spares the mentally ill offender from the full weight of criminal responsibility for otherwise criminal acts, and represents a balanced restriction necessary for protection of the public.

We acknowledge reference to the leading case of *Winko v. Forensic Psychiatric Institute (B.C.)* cited by the Joint Review at page 58. However, in referencing the point that the level of care and management of NCR offenders must be the "least restrictive and least onerous", the Joint Report does not accurately reflect the

substance of the Supreme Court of Canada's decision in this important case and subject matter.

The measures must be the least restrictive or onerous, taking into account the measures necessary to ensure protection of the public including the specific history of the individual offender, necessary treatment, reintegration to society and other appropriate needs.

In this respect, the simplistic rejection of GPS tracking for surveillance of NCR offenders results in the Joint Review falling far short of this necessary and reasonable protection for the public. We demand more, on Raymond's behalf.

Raymond's Family urges the Government and Capital Health to move beyond the recommendations contained with the Joint Review on this specific issue, and take steps to both fund research and implement limited use of GPS tracking for violent offenders found to be NCR and permitted access to the public by use of unescorted passes.

Conclusion

We appreciate the opportunity to provide a response to the Joint Review. While generally supportive, Raymond's Family do have some additional recommendations that they strongly urge the Government and Capital Health to adopt and include in the implementation of the Joint Review recommendations.

No offender held at the Hospital must ever have access to unescorted public access prior to CCRB review.

Those NCR offenders who abuse the privilege of unescorted public access by going AWOL must have that privilege removed, without reinstatement prior to further review by the CCRB.

GPS tracking technology represents a reasonable and effective additional tool for NCR offender surveillance, particularly for those with a history or risk of personal violence, and must be adopted in Nova Scotia.

In implementing all and further recommendations flowing from the Joint Review, we must again remind ourselves of the appropriate context: the twin goals of protecting the public and treating the mentally ill offender fairly and appropriately.

We look forward to receiving a copy of the upcoming report to be provided to the public within 6 months of the Joint Review.

We welcome your acknowledgement and written response at your convenience. We trust on review of this submission, Government will agree with these further recommendations and will ensure further action is taken in addition to the important recommendations flowing from the Joint Review.

Yours very truly,

WICKWIRE HOLM

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